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No. 89-1718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BANQUE DE PARIS ET DES PAYS-BAS,
Petitioner,

v.

EXXON COMPANY, U.S.A.,
Respondent.

On Petition for Writ of Certiorari to the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AS AMICUS CURIAE OF AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

In accordance with the provisions of Rule 37.2 of the Supreme Court Rules, the American Bankers Association hereby respectfully moves for leave to file a brief as amicus curiae in support of the Petitioner. Counsel for the Petitioner has consented to this filing; counsel for Respondent has ignored a written request for consent.

The American Bankers Association, as representative of the commercial banking industry at large has a distinct interest in preserving the smooth operation of the letter of credit aspect of our business. In furtherance of that interest, the Association appeared as amicus curiae in this case in the Fifth Cir-

cuit, and also appeared as amicus curiae in *Kerr Construction Company v. Plains National Bank*, 753 S.W. 2d 181 (Tex. App.-Amarillo 1987, writ denied). The applicability of the latter decision as binding precedent upon the Fifth Circuit here is a principal issue for which Banque Paribas seeks certiorari.

The *Kerr* decision represents a serious threat to letters of credit operations of commercial banks. That device is primarily, though not exclusively, used in interstate and international transactions, and, as such, it is critical that uniform rules be applied to such transactions. *Kerr* is at odds with the way letter of credit law is interpreted and applied elsewhere. If that case fairly represented the law of Texas (which it does not), we would have to concede that Texas may do what it wishes to its own intrastate commerce. But it cannot apply aberrant rules in such a fashion as to impede interstate commerce. The Fifth Circuit's mechanical obeisance to *Kerr* authorizes exactly that kind of impediment, however, as we propose to show in the attached brief as amicus curiae.

We respectfully submit that this added perspective on the Fifth Circuit's decision here may materially assist the Court in determining whether to grant the petition.

Respectfully submitted,

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QUESTION PRESENTED

Whether the *Erie* doctrine requires federal courts, sitting in diversity cases, to adhere to interpretations of state law by state intermediate appellate courts, developed in the context of a purely local transaction, and apply those interpretations automatically to interstate transactions in disregard of any undue burden upon interstate commerce that might entail.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:	Page
Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959)	7
City National Bank v. Westland Towers Apartments, 152 Mich. App. 136 (1986)	6
Consolidated Aluminum Corporation v. Bank of Virginia, 544 F. Supp. 386 (D. Md. 1982); *aff'd* 704 F.2d 136 (4th Cir. 1983)	6
Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas, 889 F.2d 674 (5th Cir. 1989)	3
Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas, 828 F.2d 1121 (5th Cir. 1987), *vacated* 109 S. Ct. 299 (1988)	5
Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977)	8
Insurance Company of North America v. Heritage Bank, 595 F.2d 171 (3d Cir. 1979)	6
G. Jaris & Co. v. Banque d'Athenes, 245 Mass. 546 (1923)	6
Kassel v. Consolidated Freightways, 450 U.S. 662 (1981)	*passim*
Kerr Construction Company v. Plains National Bank, 753 S.W.2d 181 (Tex. App.-Amarillo 1987, writ denied)	*passim*
Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960)	12
Liberty National Bank & Trust Co. v. Bank of America, 218 F.2d 831 (10th Cir. 1955)	6
Pike v. Bruce Church Inc., 397 U.S. 137 (1970)	*passim*
STATUTES:	
U.C.C. § 5-109(2)	11
U.C.C. § 5-112	11
U.C.C. § 5-114(1)	11

Table of Authorities Continued

Page

MISCELLANEOUS:

American Bar Association/U.S. Council on International Banking, *An Examination of U.C.C. Article 5 (Letters of Credit)* (1989) 2

J. Dolan, *The Law of Letters of Credit* (1984) 2,9

H. Harfield, *Letters of Credit* (1979) 5,6

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BRIEF AS AMICUS CURIAE OF AMERICAN BANKERS ASSOCIATION

The American Bankers Association, with leave of the Court, hereby respectfully submits this brief as amicus curiae to urge the Court to grant the Petition for Writ of Certiorari in the above-entitled case.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the commercial banking industry in the United States. It represents banks of all types and sizes—national and state-chartered, money center, regional and community banks, bank holding company- owned and independent banks. There are ABA member banks in each of the fifty

states and the District of Columbia, and our banks hold approximately ninety-five percent of the domestic assets of American banks.

Issuing letters of credit is no small part of the banking business. Approximately $200 billion in credits are now outstanding in the United States.[1] As we further develop below, letters of credit have a special role in facilitating interstate and international multiparty transactions. The letter of credit device can only fill that role if all parties to any given transaction have a common understanding of the rules under which they are operating. In recognition of that need, the legislatures of the fifty states have enacted Article 5 of the Uniform Commercial Code, and the international business community, under the auspices of the International Chamber of Commerce, has promulgated and agreed to abide by the Uniform Customs & Practice for Documentary Credits.[2] As the names of both imply, it was the intent of the legislators and businessmen that the rules for letters of credit *be* uniform across jurisdictional boundaries.

The *Exxon* case, for which a petition for writ of certiorari is sought here, was one of two cases proceeding almost in tandem through the court systems—one federal, one state. The other case, *Kerr Construction Company v. Plains National Bank*, 753

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[1] American Bar Association/U.S. Council on International Banking, *An Examination of U.C.C. Article 5 (Letters of Credit)* (1989) at xi.

[2] *See* J. Dolan, *The Law of Letters of Credit* (1984), ¶ 6.02: "Since 1962, all significant banking centers, with few exceptions, have adopted the Uniform Customs formally or informally and have thereby obviated the plethora of technical problems that could sabotage the smooth operation of documentary credits."

S.W.2d 181 (Tex. App.-Amarillo 1987, writ denied) involved the interpretation and application of Texas law to a transaction involving three parties located and doing business close to one another in the 175,000 population city of Lubbock, Texas. In that case, the intermediate level appellate court concluded that a specific expiry date in a letter of credit need not be strictly enforced. Thereafter, in the *Exxon* case, the Fifth Circuit robotically followed the *Kerr* precedent against its own better inclinations[3] and even though the Texas Supreme Court advised the Fifth Circuit that it did not have to do so.[4] The effect of the court's decision is to apply an interpretation of law developed in a purely local context to a huge multinational corporation and a huge multinational financial institution in a transaction occurring in interstate and international commerce. Since the Amarillo court's interpretation of the law is grossly out of line with law and practice elsewhere, the extension of *Kerr* beyond parties in the locality in which it was handed down creates a major impediment to the smooth operation of letters of credit. The American Bankers Association has a distinct interest in urging this Court to prevent that from happening.

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[3] "[W]e too must resist the view of sound commercial policy on which we relied in part in *Exxon I*." *Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas*, 889 F.2d 674, 678 (5th Cir. 1989) (App. 7). ("Exxon II".)

[4] Texas Supreme Court Order (App. 10).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has decided an important question of federal constitutional law in a way that conflicts with applicable decisions of this Court.

Banque Paribas' Petition for a Writ of Certiorari has already set forth compelling reasons why this Court should entertain a full briefing and oral argument on the merits of this case. The fact that an intermediate appellate state court has rendered an interpretation of state law does not necessarily mean that its interpretation *is* the law of the state. A diversity court, under the *Erie* doctrine, has the same right as any other state court to render a conflicting interpretation of state law until the state Supreme Court holds otherwise. Since the Third Circuit has so applied the *Erie* doctrine, the Fifth Circuit's decision here automatically to follow *Kerr* creates a conflict between the Circuits. Such a conflict needs to be resolved by this Court.

No point would be served by our repetition of the bank's arguments. Instead, we carry the analysis a step further. Even if it is assumed, for purposes of argument, that the *Kerr* decision accurately sets forth the law of Texas (which it does not), that does not mean that the holding of *Kerr* can be applied in the different context in which *Exxon* arose.

A letter of credit transaction arises from the need of one party to a contract to provide financial assurances to the other party. That need may simply derive from the fact that the first party is lacking in the necessary financial strength to be "carried" by the other party. More often than not, however, the letter of credit is issued in a transaction because the

parties are so far separated, geographically or by political boundaries, that it would be difficult, costly, or even impossible for one party to examine the creditworthiness of the other party before entering into the transaction or to enforce its rights against the other party should the transaction fail for whatever reason. (*See generally*, H. Harfield, *Letters of Credit* (1979) at 8-22.) As the Fifth Circuit has recognized itself, earlier in this case, "[t]he credit substitutes a known, accessible, and demonstrably impeccable source of funds in the event of default by the party whose performance it guarantees." *Exxon Company U.S.A. v. Banque de Paris et des Pay-Bas*, 828 F.2d 1121, 1124 (5th Cir. 1987), *vacated* 109 S. Ct. 299 (1988) (App. 40) (hereinafter referred to as "*Exxon I*," the citations to which will be to the Appendix ("App.") to the Petition for Writ of Certiorari).

The letter of credit, while it bears some resemblance to other financial devices, is truly *sui generis*. In recognition of that, there are special rules applicable to letters of credit. In general,

> [a] letter of credit is strictly construed. There is no room for modification, reformation, or interpolation. Paradoxically, this rigidity of construction is essential to the achievement of flexibility in the use of the instrument. Letters of credit may readily be adapted to provide financial support for any transaction. A responsible issuer cannot prudently provide this support without a precise evaluation of the risks involved . . . . [T]he issuer . . . must know who does what and with whom, and must be sure that his expectations in that regard will not be altered.

* * *

> The letter of credit is an invaluable tool that can be employed to facilitate an unlimited variety of transactions. Its utility, however, depends upon recognition of, and sedulous attention to, it essential characteristics. The basic principals of its nature and operation can be altered or ignored only at the price of spoiling the instrument.

Harfield, *Id.* at 2, 5.

In a specific application of this general principal, it is widely recognized that a stated expiry date appearing in a letter of credit must be strictly enforced. *See, e.g., Insurance Company of North America v. Heritage Bank*, 595 F.2d 171, 174-175 (3d Cir. 1979); *Liberty National Bank & Trust Co. v. Bank of America*, 218 F.2d 831, 840-41 (10th Cir. 1955); *Consolidated Aluminum Corporation v. Bank of Virginia*, 544 F. Supp. 386, 393-94 (D. Md. 1982); *aff'd* 704 F.2d 136 (4th Cir. 1983); *City National Bank v. Westland Towers Apartments*, 152 Mich. App. 136 (1986); *G. Jaris & Co. v. Banque d'Athenes*, 245 Mass. 546, 141 N.E. 576, 577 (1923); *See also* H. Harfield, *Letters of Credit* (1979) at 36. Until this case and *Kerr*, no court, to our knowledge had ever held that an expiry date in a letter of credit would be extended or payment conditions modified because of "impossibility." In this case, the letter of credit at issue required Exxon to draw against the letter not later than October 31, 1981. When Exxon sought to draw against it on November 30 and December 1, 1981, the bank refused to honor the draw. In the *Kerr* case, the letter of credit provided that a draw against the letter had to be made by July 1, 1985. When the City of

Lubbock attempted to draw against the letter on July 17, 1985, the bank likewise refused to honor it. The *Kerr* court, unlike most other courts, refused to enforce the letter as written. The *Kerr* decision is, therefore, an aberration in otherwise commonly interpreted law.

The courts in Amarillo, Texas, may wish to take the local commercial practices of their own area and secede from the state, the union and the planet. But under our federal system, the black hole they create when they go cannot be permitted to suck in the rest of the universe of interstate and international transactions after them. This Court has effectively so held in *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) and subsequent cases. Where the Fifth Circuit has effectively authorized such an impediment to interstate commerce, it has acted inconsistently with the direction from this Court.

Bibb was the famous Illinois mudguard case. The State of Illinois, by statute, prescribed precise and exacting standards for the mudguards that were required for trucks operating on the roads in that state. There was nothing inherently good or bad about the specifications; as in this case, there was no federal statute or regulation with which Illinois law conflicted; and the law purported to apply only within the borders of the State. Nevertheless, this Court struck down the statute as applied. The problem with Illinois law was that it was an aberration. It was inconsistent with the uniform industry standard. Mudguards complying with the industry standard were legal in forty-five other states, and mudguards complying with Illinois law would have been *illegal* in at least one other state. The effect of the law, therefore,

was to require trucks moving in interstate commerce to stop at the border of Illinois and change their mudguards, incurring lost time and expense in doing so, to no great advantage of anyone. It served only as an impediment to the "policy of free trade reflected in the Commerce Clause," *Bibb*, 359 U.S. at 529.

It is clear from the *Bibb* opinion that there was no concern over the need for one particular style of mudguard over another. The concern was only over the need for some—any—kind of uniformity among various jurisdictions in this area.

Similarly, in *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981), the State of Iowa disallowed the use of 65-foot double trailer trucks within the borders of the state. At the time, all other states in the midwest and west allowed them. Such trucks were widely used and preferred in the trucking industry because of their greater capacity and the easy ability to detach the trailer and route it separately as needed. Consolidated Freightways challenged the constitutionality of the statute. At trial, it was found that 65-foot double trailers were as safe as the 55-foot single trailers otherwise used and allowed in Iowa. This Court held the Iowa statute to be an unconstitutional impediment to interstate commerce:

> [T]he (Commerce) Clause itself is 'a limitation upon state power even without congressional implementation.' *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 350 (1977). The Clause requires that some aspects of trade remain free from interference by the States. When a State ventures excessively upon the regulation of

> these aspects of commerce, it 'trespasses upon national interests' . . . and the courts will hold the state regulation invalid under the clause alone.

Id. at 669 (citation omitted.).

Finally, in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court set forth the analytical framework for determining which state laws could constitutionally affect interstate commerce and which could not:

> Where the statute regulates evenhandedly[5] to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142.

These are the principals which govern this case as well. Unlike *Bibb*, *Pike* and *Kassell*, there does not

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[5] This is the kind of determination that "lends itself well to the courtroom setting of legal briefs, oral arguments, and expert testimony on industry practices and to lengthy review of prior transactions. It does not lend itself well to the bank letter-of-credit department, where document examiners must review the documents against the credit and decide promptly whether to honor the beneficiary's draft. The kind of inquiry that the minority rule commands takes more time and requires more legal analysis than document examiners can give and more than the credit transaction can afford." J. Dolan, *The Law of Letters of Credit* ¶ 6.02 (1984).

seem to be any colorable local interest at all in construing letters of credit "liberally," whereas strict construction is the rule elsewhere. Certainly, the Texas legislature (the body one normally would look to for expressions of the public policy of the state) has not spoken to that specific issue—other than by its enactment of the *Uniform* Commercial Code, Article 5 which governs letters of credit in all fifty states.[6] As in at least *Bibb* and *Kassel*, there is a need for uniformity in the interpretation and application of letter of credit law insofar as interstate and international transactions are concerned. This is not merely a representation by the banking industry made in its own self interest. To the contrary, the Fifth Circuit itself, in *Exxon I*, *found* the need for uniformity to be critical and *found* the rule it has now adopted to be disruptive of that uniformity:

- The function of letters of credit *requires* that they be succinct and clear, for their utility lies in the assurance they provide that payment will

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[6] The courts give especial scrutiny to those state laws which do not regulate "evenhandedly" but are alleged to discriminate in favor of local commerce and against interstate commerce. No such "discrimination" is involved in this case: The Texas Court of Appeals at Amarillo would apparently have resolved the issue the same way whether a local bank or an out-of-state bank had issued the letter of credit involved in the *Kerr* case. However, it was not necessary for anyone to plead and prove "discrimination" in either *Bibb*, *Kassel* or *Pike* in order for the challenged statutes to be struck down. It was sufficient in each case to show the "burden" on interstate commerce alone. Similarly, courts give special scrutiny to state laws claimed to be incompatible with governing federal law. No contrary federal law applies here and none is asserted. But neither was there contrary federal law at issue in *Bibb*, *Pike* or *Kassel*.

be made *on the specified terms* without delay or litigation. (App. 36) (emphasis added.)

- Letters of credit facilitate commercial transactions, particularly in international commerce, by assuring certainty in application, *consistency in interpretation across jurisdictional boundaries*, and swiftness in execution. (App. 40) (emphasis added.)
- A letter of credit is therefore strictly construed. (App. 41)
- Good banking practice and common sense require that the bank's liability terminate at a date certain. (App. 43)
- In letter-of-credit transactions, as in many other legal areas, certainty of result and practicality of performance by laymen are of paramount importance. (App. 45)

When a banker sitting, for example, in New York, receives a claim under a letter of credit, he is obligated to honor it if it appears regular on its face or dishonor it if it does not. U.C.C. Sections 5-109(2), 5-114(1). The banker has three banking days to decide which to do. U.C.C. Section 5-112. So long as the law is uniform and strictly construed, that does not ordinarily present a problem.

But the normal procedures for processing claims cannot afford to have a footnote which says "except in Texas, or maybe only in the 7th District of Texas (we're not sure), in which case considerations other than facial regularity or irregularity apply, but we don't know what those considerations are." That is what *Kerr*, and now the Fifth Circuit, would require

of bankers everywhere whose letter of credit transactions might touch upon a party with a Texas (or Texas Panhandle) connection.[7] It would take longer to sort through that exception to otherwise commonly followed practices than it would to change mudguards on a truck.

Finally, in *Bibb* and in *Kassel*, the state laws under attack were not challenged as being inconsistent with the *laws* of other states (except in one isolated instance in the *Bibb* case). Other states did not *require* shippers to use 65-foot double trailers; most other states did not *require* straight mudflaps instead of curved mudguards. To the contrary, the Illinois and Iowa statutes were challenged as contrary to reasonable nationwide private industry practices *allowed* by laws in other jurisdictions. Here, the fact of the matter is that it is universal industry practice for issuers of letters of credit to include a specific expiry date in each letter,[8] to expect that such specific expiry dates will be honored as written, and to act upon that expectation. The laws of other jurisdictions give effect to industry practice. Texas (or the 7th District of Texas) cannot act in such a fashion as to defeat those

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[7] The fact that Texas (or the 7th judicial district of Texas) common law is involved in this case and is asserted to be an impediment to interstate commerce whereas there were state statutes involved in *Bibb*, *Kassel* and *Pike* is of no relevance. State common law which conflicts with the Constitution is as invalid as state statutes or regulations which do so. *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960).

[8] As the Fifth Circuit itself recognized, "Article 37 of the Uniform Customs (and Practice for Documentary Credits) requires all letters of credit made subject to it to stipulate an expiry date. Paribas' letter of credit expressly incorporated by reference the Uniform Customs" *Exxon I*, App. 42.

just and reasonable expectations of the industry nationwide and worldwide or, standing alone, dictate a nationwide or worldwide sea change in the way the letter of credit business is conducted without constituting a burden upon interstate and international commerce. The burden is an excessive one and it is "balanced" against no known or articulated or even imaginable "public interest" of the local jurisdiction.

CONCLUSION

Bibb v. Navajo Freight Lines and its progeny recognize the broad and pervasive power of States to regulate commerce within their borders, even where such regulation may have an impact upon interstate commerce. Nevertheless, the Court has regularly recognized that there are circumstances in which a state may stray so far from the norm that its policies cannot be permitted to obstruct free trade. It is a matter of proof. Here, the fifty states (including Texas) have set forth their public policy in favor of consistent legal treatment of letters of credit by enacting a uniform law, Article 5 of the Uniform Commercial Code (a statute flatly ignored in the *Kerr* decision). The Fifth Circuit, likewise, originally determined that uniformity of legal treatment was critical in this area. More proof than that is hardly needed. And yet, the bottom line of the Fifth Circuit's opinion is to sanction the

very kind of aberrant and obstructive local law condemned by this Court in *Bibb*, *Pike* and *Kassel*. The Petition for Writ of Certiorari should be granted.

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